

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRED LEWIS EVANS,

Defendant-Appellant.

UNPUBLISHED
February 16, 2012

No. 299803
Wayne Circuit Court
LC No. 10-003696-FC

Before: SERVITTO, P.J., and TALBOT and K. F. KELLY, JJ.

PER CURIAM.

Defendant was convicted by a jury¹ of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227(2), and possession of a firearm during the commission of a felony (second offense), MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 15 to 40 years for the robbery conviction and two to five years each for the felon-in-possession and CCW convictions, all of which were to be served consecutively to a five-year term of imprisonment for the felony-firearm (second offense) conviction. We affirm defendant's convictions, but remand for correction of the judgment of sentence.

Defendant argues that he is entitled to a new trial because the prosecutor improperly shifted the burden of proof during closing argument. We disagree.

We review claims of prosecutorial misconduct on a case-by-case basis, examining the record and reviewing the prosecutor's comments in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

¹ The amended judgment of sentence erroneously indicates that defendant was convicted by guilty plea.

The defense theory of the case was that the victim was not a credible witness and lied about defendant committing the crime. In response, the prosecutor attempted to argue that the jury should find that the victim was a credible witness because he had no reason to lie. The prosecutor stated:

The elephant in the room, ladies and gentlemen, is why, why, why? If Mr. Evans sitting here has done nothing to Mr. Jones, why is Mr. Jones even here? Why is he saying that Mr. Evans did this? Why is he making this up? Why? That's the biggest question of all and I submit to you the Judge is go[ing to] instruct you on reasonable doubt and part of the reasonable doubt instruction is going to tell you that a reasonable doubt is something you can point to and say that's the reason why I doubt it. I submit to you if no reason has been given to you, why Mr. Jones would blame a completely innocent Mr. Evans of doing something he never did, if that's not explained to you, then you don't have a reasonable doubt. You don't have that big reason to say well here it is; here it is; he[re] is Mr. Jones' reason. Here is why he's blaming Mr. Evans from something he didn't do. You don't have that and so you don't I submit to you, ladies and gentlemen, have a reasonable doubt.

A prosecutor may respond to arguments and may argue that a witness should be believed. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). However, a prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because that would improperly shift the burden of proof. *People v Fyda*, 288 Mich App 446, 464; 793 NW2d 712 (2010); *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), disapproved on other grounds by *People v Fields*, 450 Mich 94, 115 n 24; 538 NW2d 356 (1995).

Here, the manner in which the prosecutor phrased his argument could be construed as suggesting that the jury should not reject the victim's testimony unless the defense presented some explanation for the victim to falsely accuse defendant. However, the error did not deny defendant a fair trial. To the extent that the prosecutor's argument could be viewed as improperly shifting the burden of proof, the trial court's instructions regarding the presumption of innocence, the burden of proof, defendant's right not to testify, and the lawyer's arguments cured any error. The trial court's instructions are presumed to cure most errors, *Abraham*, 256 Mich App at 279, and jurors are presumed to follow the court's instructions unless the contrary is clearly shown. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Here, the trial court's instructions protected defendant's right to a fair trial and rendered any error in the prosecutor's argument harmless beyond a reasonable doubt. *People v Hyde*, 285 Mich App 428, 447; 775 NW2d 833 (2009).

Defendant also argues that the trial court erroneously ordered his sentence for CCW to be served consecutively to the felony-firearm sentence. The prosecutor concedes error entitling defendant to relief and we agree. By law, a felony-firearm conviction cannot be predicated on a conviction for CCW. MCL 750.227b(1); *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994). Further, the felony-firearm charge was predicated on the underlying offenses of armed robbery and/or felon in possession of a firearm, and a felony-firearm sentence can be

“consecutive only to the sentence for a specific underlying felony.” *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000). Accordingly, we remand for correction of the judgment of sentence to specify that defendant’s sentences for CCW and felony-firearm are to be served concurrently. We also direct that the judgment of sentence be corrected to specify that defendant was convicted by a jury, not by a guilty plea.

Affirmed in part and remanded for correction of the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Kirsten Frank Kelly